

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

Case no.: 6:11-cv-1075-Orl-31GJK

NATIONAL MENTOR HEALTHCARE, LLC;	)	Orlando, Florida
LILLIAN TORRES; and NANCY NIEMANN,	)	July 19, 2011
	)	9:30 a.m.
Plaintiffs,	)	
	)	
v.	)	
	)	
COMMUNITY BASED CARE OF BREVARD,	)	
INC.,	)	
	)	
Defendant.	)	

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Transcript of the motion for Temporary Retraining  
Order and Preliminary Injunction, and the motion to dismiss  
before the Honorable Gregory A. Presnell  
United States District Judge

**Appearances:**

Counsel for Plaintiffs: John F. MacLennan

Counsel for Defendant: David P. Hathaway

Counsel for Amicus  
Florida Agency: Andrew T. Sheeran

Court Reporter: Diane C. Peede, RMR, CRR  
United States Courthouse  
401 West Central Blvd., #4600  
Orlando, Florida 32801  
(407) 615-0305.

Proceedings recorded by mechanical stenography, transcript  
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*Diane Peede, RMR, CRR (407) 615-0305*

1 PROCEEDINGS

2 THE COURT: Lisa, if you would, call the case.

3 THE COURTROOM DEPUTY: This is in the matter of  
4 National Mentor Healthcare, LLC, Lillian Torres and Nancy  
5 Niemann versus Community Based Care of Brevard, Incorporated,  
6 case number 6:11-civil-1075-Orlando-31GJK.

7 THE COURT: Okay. And appearing for the plaintiff?

8 MR. MacLENNAN: John MacLennan for the plaintiff,  
9 Your Honor.

10 THE COURT: All right. And for the defendant?

11 MR. HATHAWAY: Dave Hathaway of Dean, Mead for the  
12 defendant.

13 THE COURT: All right. We're here today on a  
14 motion for preliminary injunction which was filed in this  
15 case, and I've got the defendant's response. We also have  
16 the defendant's motion to dismiss which has been filed and, I  
17 think, also responded to. So you're free to address that as  
18 well today.

19 Do you anticipate the need for any evidence?

20 MR. MacLENNAN: Not beyond what's already of  
21 record, Your Honor.

22 MR. HATHAWAY: Your Honor, we think the affidavits  
23 speak for themselves. We do have a few of the individuals  
24 who signed affidavits here in the courtroom, if the Court  
25 would like any additional information.

1 THE COURT: Okay. Well, then, let's just go ahead  
2 and take argument based on the filings and we'll go from  
3 there.

4 Mr. MacLennan.

5 MR. MacLENNAN: Thank you, Your Honor. The dispute  
6 here today is whether or not the defendant properly has  
7 limited the Medicaid providers who are permitted to provide  
8 certain types of Medicaid coverage services with respect to  
9 foster care children within Brevard County, Florida.

10 Its our contention that in fact the defendant is  
11 not permitted to do that for the reason that the Medicaid  
12 statute part of the Social Security Act has what's termed the  
13 Medicaid Freedom of Choice provision, and, boiled down to its  
14 essence, the Medicaid "freedom of choice provision" states  
15 that a person eligible for Medicaid medical assistance is  
16 entitled to receive that assistance from any provider who was  
17 willing to provide that assistance.

18 What has happened here is Florida Mentor is a  
19 provider of Medicaid-covered services to foster care children  
20 prior to July 1 of this year. Florida Mentor was providing  
21 those services primarily pursuant to an agreement between  
22 Florida Mentor and the defendant C.B.C.B.

23 Now, actually in Brevard County, there are a  
24 combination of different types of foster children. The  
25 foster children who originated within Brevard County were

1 being provided services by Florida Mentor pursuant to  
2 Mentor's contract with the C.B.C.B. There were other foster  
3 care children who originated from counties other than  
4 Brevard. We've referred to them in some of our materials as  
5 "Out-of-county foster children."

6 Those foster children, while receiving foster care  
7 services, including Medicaid-type foster care services within  
8 Brevard County, were in fact being funded not by C.B.C.B.,  
9 but by other funding sources; and we don't believe those out-  
10 of-county foster children were subject to either the contract  
11 between the C.B.C.B. and Florida Department of Children and  
12 Families or the contract between Florida Mentor and C.B.C.B.,  
13 which expired June 30 of this year, or, for that matter, the  
14 request for proposal and the new contract between the  
15 C.B.C.B. and the Devereux Foundation.

16 Our challenge is to the actions taken by the  
17 C.B.C.B. in the request for proposal. In May of this year,  
18 Florida Mentor was notified that it would -- effective June  
19 30 its contract would not be renewed, and the C.B.C.B.  
20 entered into a request for a proposal process.

21 Florida Mentor, along with other potential  
22 providers of foster care services, including Medicaid  
23 services, responded with a proposal. Florida Mentor was  
24 notified on June 9 that its proposal was not accepted. The  
25 R.F.P. itself provided for, I would term it, a fairly

1 informal appeals process which Florida Mentor went through,  
2 two written appeals by Florida Mentor, the last of which was  
3 determined adversely to Florida Mentor on June 23 of this  
4 year, and then Florida Mentor filed this lawsuit on June 28.  
5 And the gravamen of the lawsuit is that Florida Medicaid --  
6 sorry -- the Medicaid freedom of choice simply doesn't permit  
7 someone to limit Medicaid-eligible individuals from their  
8 freedom to choose providers, and we cite the O'Bannon case, a  
9 United States Supreme Court decision which says exactly that.  
10 Medicaid-eligible individuals have a freedom of choice that  
11 can't be interfered with.

12 We think the primary legal issue raised both by  
13 C.B.C.B.'s opposition to our motion for injunction and their  
14 motion to dismiss is whether or not the plaintiffs in this  
15 action, Florida Mentor and two foster parents, have the  
16 standing to raise these issues.

17 I don't believe in their materials that the  
18 defendant argues either that the "freedom of choice"  
19 provision does not grant a right enforceable under Section  
20 1983. I don't believe they argue that, nor I don't believe  
21 they argue that the defendant is not a state actor for  
22 purposes of Section 1983. They make reference to the recent  
23 decision in the Middle District in Jacksonville which holds  
24 to that effect, holding a state -- a foster care provider as  
25 a state actor for purposes of 1983. So I think the focus of

1     their opposition to our injunction and their motion to  
2     dismiss is the standing.

3             We submit that Florida Mentor itself has standing  
4     and we submit, moreover, that the foster parent plaintiffs  
5     have standing.

6             I think that the parties have laid out pretty  
7     clearly the state of play in the law with respect to the  
8     provider standing. The Eleventh Circuit in the Silver case,  
9     which I believe both parties cited, left it as an open  
10    question.

11            We cite to the Bay Ridge case from the Eastern  
12    District of New York, which held that providers do have  
13    standing under the "freedom of choice" provision. Defendants  
14    cited to a case from the Northern District of Georgia which  
15    held exactly the opposite.

16            We cite also to the recent, June of this year,  
17    decision by the District Court in Indiana in the Planned  
18    Parenthood case. There, Planned Parenthood, along with  
19    Medicaid beneficiaries, sued, seeking to enjoin an Indiana  
20    statute which defunded Planned Parenthood from participating  
21    in Medicaid. And there, while the court didn't discuss  
22    standing, the injunction that was entered on behalf -- in  
23    favor of the plaintiffs gave relief primarily to Planned  
24    Parenthood. It prohibited Indiana from in fact defunding  
25    Planned Parenthood.

1           It would appear from a reading of that decision  
2     that the court was assuming that Planned Parenthood had  
3     standing, although I couldn't tell from the materials in that  
4     case whether the defendant argued to the contrary.

5           We believe in a case like this, where the  
6     individual -- the Medicaid-eligible beneficiaries are these  
7     foster children, that that presents a unique set of  
8     circumstances which should incline the Court to hold that  
9     Florida Mentor has standing, while we acknowledge that it's  
10    an open issue in this circuit.

11           With respect --

12           THE COURT: Can you explain to me the basic  
13    relationship here between the defendant -- I mean, there's a  
14    funding source and then we have Community Based Care of  
15    Brevard, which I'm not sure what you call them, and then they  
16    contract with providers who provide the actual service, which  
17    your client was?

18           MR. MacLENNAN: Our client was one of four, I  
19    believe, Your Honor, prior to July 1 of this year which  
20    provided the services. I'm not sure. I think the C.B.C.B.  
21    also had the right to provide those services. I don't know  
22    whether they were providing them themselves as well.

23           There are funding sources for -- the C.B.C.B. is a  
24    funding source for certain types of foster care, and Medicaid  
25    is a funding source for other types of foster care being

1 provided by -- well, they were being provided by Florida  
2 Mentor and three other providers. I believe effective July 1  
3 they were being provided by one provider.

4 THE COURT: So the defendant has some sort of  
5 authority to decide who gets to be providers?

6 MR. MacLENNAN: The --

7 THE COURT: Your basic claim is that they have to  
8 allow you to be a provider?

9 MR. MacLENNAN: Right. Yes, Your Honor. I think  
10 their -- the C.B.C.B. has taken the position through their  
11 request for proposal process, which led to awarding a  
12 contract to a sole provider, that they have the authority to  
13 limit those who are permitted to provide Medicaid-funded  
14 foster care services in Brevard County.

15 THE COURT: Your position is legally they don't  
16 have that discretion? They've got to deal with anybody who  
17 wants to be in the business?

18 MR. MacLENNAN: That's correct, Your Honor. And we  
19 cite -- we cite cases -- obviously, this "freedom of choice"  
20 provision is a strong provision. We cite cases where --  
21 well, in Indiana, for example. The state of Indiana wanted  
22 to say Planned Parenthood couldn't provide Medicaid services.

23 Other cases, there was -- there was a Maryland --  
24 there was a Maryland attempt to have their Medicaid only pay  
25 for certain types of providers of case management services



1 for foster care services, and the center for Medicare and  
2 Medicaid said that limited the freedom of choice and  
3 therefore it violated the "freedom of choice" provision.  
4 That's what happened in the Indiana case.

5 The C.M.S. folks denied Indiana's request to amend  
6 their plan to exclude Planned Parenthood from providing  
7 Medicaid services, and they denied that requested amendment  
8 on the basis that defunding Planned Parenthood and not  
9 permitting them to provide the services when they were a  
10 qualified provider, just like Florida Mentor is a qualified  
11 provider -- again, I don't think there's an issue about that.  
12 Indiana's attempt to exclude a qualified provider, who wanted  
13 to provide the services, from providing those services ran  
14 afoul of the Medicaid freedom of choice.

15 THE COURT: So what you're asking me to do in  
16 essence is to order them to enter into a contract with you so  
17 that you can keep providing these services?

18 MR. MacLENNAN: If it requires a contract for us to  
19 continue to provide the services, then I think that would be  
20 correct.

21 THE COURT: And how am I supposed to determine what  
22 the terms and conditions of that contract are?

23 MR. MacLENNAN: Well, I think --

24 THE COURT: I mean, do you get to choose the terms  
25 and conditions?

1 MR. MacLENNAN: With respect to the Medicaid  
2 services, I think the Medicaid statutes and regulations  
3 provide what the terms and conditions are, including the  
4 reimbursement rates that Florida Mentor would be entitled to.

5 THE COURT: So you don't really need a contract?  
6 You're saying that you can provide these services, regardless  
7 of what the defendant thinks?

8 MR. MacLENNAN: That's our position, Your Honor.

9 THE COURT: Okay.

10 MR. MacLENNAN: Yes, yes.

11 THE COURT: All right. Well, let me hear from  
12 them.

13 MR. MacLENNAN: Your Honor, I wanted to -- there  
14 was -- on the standing issue, I wanted to mention the  
15 standing of the foster parents, because that's an issue that  
16 we filed -- our opposition to their motion to dismiss  
17 yesterday, and there is a Supreme Court case in there which  
18 talks about circumstances where foster parents are permitted  
19 to have standing to assert the interest of foster children.  
20 I wanted to -- as it was only filed yesterday, I just wanted  
21 to make sure the Court was aware of that.

22 THE COURT: I haven't read it yet, but I will.

23 MR. MacLENNAN: Understood.

24 THE COURT: All right. Thank you.

25 MR. MacLENNAN: Thank you, Your Honor.

1 THE COURT: All right. Mr. Hathaway.

2 MR. HATHAWAY: Yes. Thank you, Your Honor.

3 Actually, I put together a little chart here to better  
4 understand the relationship of the parties.

5 THE COURT: Did you use your media consultant to do  
6 that?

7 MR. HATHAWAY: I did not. I just -- just because I  
8 heard the question, I thought it would be easier to look at  
9 it in a visual sense.

10 THE COURT: I can't see it from here. You can put  
11 it up on the screen over there, if you want, and we can all  
12 see it.

13 MR. HATHAWAY: Okay. Let's see if this works.

14 THE COURT: It'll work. We just need to warm it up  
15 for you.

16 There you go. Okay.

17 MR. HATHAWAY: Okay. The Department of Children  
18 and Families is ultimately -- that's the state organization  
19 that governs foster care. As you can see, if you look at the  
20 dotted line beneath, C.B.C.B., it's also referred to in some  
21 of the materials as Brevard Family Partnership, B.F.P., that  
22 is what's called a "lead agency." Lead agencies are  
23 contracted with the D.C.F. And I believe it's geographic. A  
24 lead agency will have a county.

25 Beneath C.B.C.B. you'll see are the C.P.A.s. Those

1 are child-placing agencies. And my understanding is that the  
2 lead agency, C.B.C.B., can enter into the contracts with all  
3 the providers on its own, if it chooses. However, a lead  
4 agency can also use a child-placing agency or a number of  
5 child-placing agencies to manage. That's really -- my  
6 understanding is the role of the C.P.A. is to manage the  
7 provision of certain services.

8 And AHCA, you'll see on the other side, that deals  
9 -- that's the agency of health care administration, another  
10 state agency, that deals with the Medicaid side. And the  
11 attorney for AHCA is here if you have questions for the  
12 Medicaid issues.

13 But C.B.C.B. has -- I think has around 60 contracts  
14 with providers on its own and previously had four C.P.A.s,  
15 one of which was the plaintiff, and now, as of July 1st, has  
16 gone to one C.P.A. So that's just kind of the background  
17 there.

18 We --

19 THE COURT: Does the statutory framework require  
20 that in order for a provider to be reimbursed for these  
21 services, they have to -- they have to be in a contractual  
22 relationship with C.B.C.B.?

23 MR. HATHAWAY: Does the -- I'm sorry. What was the  
24 question?

25 THE COURT: There's money flowing from the federal,

1 state governments to these providers. And my question is,  
2 for example, D.C.F. has delegated to agencies such as  
3 C.B.C.B. the authority to contract with providers who will  
4 provide the service and get paid, right?

5 MR. HATHAWAY: Yes.

6 THE COURT: So in Brevard County, for example, in  
7 order to be reimbursed for providing these services and to be  
8 an authorized provider, it has to have the approval or  
9 agreement or a contract with C.B.C.B.?

10 MR. HATHAWAY: I believe so. I believe that the --  
11 that C.B.C.B. has exclusive jurisdiction in Brevard County to  
12 deal with foster care, and I believe it is C.B.C.B. -- I also  
13 have Kelly Swartz here, who is the staff attorney for Brevard  
14 Family Partnership for C.B.C.B. She knows more about this  
15 than I do, and she's going to sit to be admitted to the  
16 Middle District next month. So she's not currently admitted  
17 to the Middle District.

18 My understanding is that D.C.F. has an exclusive  
19 contract with C.B.C.B.; and in order to get Medicaid  
20 reimbursements, the providers have to be working with  
21 C.B.C.B.

22 THE COURT: Okay.

23 MR. HATHAWAY: Okay. So I wanted to talk about  
24 why -- well, two things. The complaint should be dismissed  
25 for failure to state a claim, and because the only claim --

1 the only federal claim is this freedom-of-choice claim, there  
2 really is no subject matter jurisdiction in the federal  
3 courts.

4 Second, we believe that no injunction should be  
5 issued for many of the same reasons, but some additional ones  
6 as well.

7 I've looked at an amended complaint that was filed  
8 yesterday to see if the amended complaint cures any of the  
9 issues with the original complaint that we filed a motion to  
10 dismiss, and the amended complaint still has three  
11 plaintiffs. You've got Florida Mentor and two foster  
12 parents.

13 The standing argument is that a provide -- the  
14 "freedom of choice" provision of the Social Security act  
15 cannot be enforced by a provider. It can be enforced by a  
16 recipient of Medicaid but not a provider; and the Silver  
17 case, which is an Eleventh Circuit case, is really the best  
18 analysis of that argument, in my mind. It's very well  
19 written. It's Eleventh Circuit, 1986, and the court found  
20 that the -- it actually left the question open as to whether  
21 it was going to deny a claim under Section 1983 under the --  
22 it's a two-step process here. You've got section  
23 1396a(a)(23) is the "freedom of choice" provision, but that  
24 doesn't allow someone to sue under it directly. So you'd  
25 have to overlap that with a 1983 claim for a civil rights

1 violation of the "freedom of choice" provision.

2           The Silver case looked at three reasons why it did  
3 not appear that a Medicaid provider could enforce Section  
4 1396a(a)(23) under 1983. It looked at the plain language, it  
5 looked at the legislative history, and it looked at the U.S.  
6 Supreme Court opinion of O'Bannon. Those were the three  
7 things that the Silver case looked to.

8           It did leave the question open, because it felt  
9 that it did not need to decide it that day. Obviously, we  
10 all know the Eleventh Circuit is comprised of Alabama,  
11 Florida and Georgia.

12           Well, in 1993, the Northern District of Georgia had  
13 the occasion to decide that issue in the first instance, and  
14 Nutritional Support Services is the case cited in my motion  
15 to dismiss and memorandum in opposition. Nutritional Support  
16 Services was a case out of the Northern District of Georgia  
17 that said -- it looked at the Silver case. It agreed with  
18 the Silver case and said, "For all those reasons, we're  
19 actually going to make a decision here," and the court said  
20 that because the court concludes that the "freedom of choice"  
21 provision was not intended to benefit the plaintiffs, the  
22 court also concludes that 1396a(a)(23) does not create a  
23 federal right that they may enforce under Section 1983, and  
24 it granted summary judgment against the plaintiff's statutory  
25 claim.

1           Your Honor, I don't believe there is legitimately a  
2     conflict in the law on this. I have looked at the cases  
3     cited by the plaintiff, and the Bay Ridge Diagnostic case  
4     from New York, which is a 1975 case, it actually predates  
5     Silver, acknowledged a problem with standing, but said that  
6     it was not going to -- but what it said was any issue  
7     concerning the standing of the plaintiffs to represent the  
8     patient's interest in freedom of choice was alleviated by the  
9     presence of a number of amici which more directly represents  
10    such interests and supported the plaintiff's position.

11           That statement is even in the plaintiffs' brief.  
12    So both the plaintiff and the defendant agree that that is  
13    relevant.

14           Your Honor, the Planned Parenthood case out of  
15    Indiana, I don't think that is relevant because the  
16    plaintiffs included two Medicaid recipients, and what's  
17    really the issue here is, who are the plaintiffs? Are they  
18    the recipients, the people receiving Medicaid services or are  
19    they the providers?

20           I see what they've tried to do in the amended  
21    complaint, which is to try to say that the plaintiff foster  
22    parents are losing their freedom of choice; but, in reality,  
23    they're not receiving the Medicaid services. It's kind of a  
24    play on words to say that they're losing their freedom of  
25    choice because they prefer to use Florida Mentor as their



1 child-placing agency, but now the child-placing agency is  
2 Devereux.

3 There's no damages, no -- I mean, this happens all  
4 the time. If you work at a large corporation and they change  
5 their health plan, it may be that most of your doctors can  
6 stay the same. It may be that two or three are changed, and  
7 that may be annoying, but that doesn't allow a civil cause of  
8 action.

9 And there's no rule requiring a lead agency to  
10 always use the same child-placing agency. I mean, that would  
11 be -- I think it's kind of obvious that if you have a term  
12 contract with a child-placing agency, at the expiration of  
13 the term you can renew it. You can find several C.P.A.s.  
14 You could say, "You know what? We're going to bring it all  
15 in-house and not use a C.P.A." It's -- there's no rule  
16 requiring you to indefinitely use the same child-placing  
17 agency.

18 The other thing is that Florida Mentor attempted to  
19 be the sole child-placing agency, because in May they were  
20 alerted that their contract was not going to be renewed, and  
21 in June there's a bidding process where there were five  
22 applicants and they all submitted bids and you'll see from  
23 the affidavits that they were scored, and actually the  
24 plaintiff Florida Mentor was one of the top three of five. I  
25 think it was third out of the five, and they did an

1 additional analysis to determine, among those three close  
2 bidders, which one they wanted to approve, and C.B.C.B. chose  
3 Devereux.

4 Then Florida Mentor appealed it twice in June. The  
5 dates are in those affidavits, and the -- if they had sued --  
6 if they really briefed that you couldn't go to one C.P.A. in  
7 May, if they thought that was the rule, then, well, they knew  
8 about that in May. They could have filed their complaint at  
9 the end of May or early June and this hearing would have been  
10 prior to the June 30th termination of their contract; but,  
11 instead, Florida Mentor decided we're going to participate in  
12 the bid and try to win it and they filed two appeals, trying  
13 to win it. Then when they got their final rejection letter  
14 is when they filed suit, and now all the services are being  
15 transferred over to Devereux.

16 So an injunction at this point, it wouldn't make  
17 any sense. It would actually cause harm, because, I mean,  
18 imagine what would happen. The children are now under a new  
19 manager. Most of them, I think, are using the same  
20 therapist. It sounds like there are 14 children who are  
21 being transitioned to a new therapist. But Devereux is now  
22 in the position of managing this on a day-to-day basis.

23 I don't believe courts can unwind the contract with  
24 a new C.P.A. and then mandate a contract, some kind of a new  
25 contract, between two adverse parties. I mean, at this point

1 C.B.C.B. and Florida Mentor probably are not going to work  
2 very well together. It just -- it doesn't make any sense to  
3 me.

4 Now, the other issue is the scope. I was talking  
5 about standing before as to why the complaint doesn't state a  
6 claim. The scope of the Social Security Act dealing -- the  
7 "freedom of choice" provision, the first line of the "freedom  
8 of choice" provision is a state plan for medical assistance  
9 must provide that any individual eligible for medical  
10 assistance may obtain such assistance from any institution,  
11 and then it goes on. So it's really about medical  
12 assistance.

13 We don't believe that a lead agency or a C.P.A. is  
14 directly providing medical assistance anyhow. It's not a  
15 freedom of choice. I mean, I don't think that you've got a  
16 freedom of choice with regard to management companies. The  
17 freedom of choice under the Social Security Act is about the  
18 rendering of medical services, and there are 27 -- and this  
19 is pretty complex, Your Honor, and we also -- we have a  
20 lawyer here from AHCA who may be able to answer more  
21 questions about it. But there are 27 general health care  
22 categories under Section 1396d(a), and foster care does not  
23 appear in that list of 27.

24 And if foster care even were deemed medical  
25 services, there's something called a 1915(b) waiver, which, I

1 believe, makes Florida even exempt from the "freedom of  
2 choice" provisions anyway. So we don't believe that the  
3 scope of this statute, this federal statute, even involves  
4 foster kids.

5 And, remember, on an injunction, it's the  
6 plaintiff's burden. We don't -- I mean, I have researched  
7 it, but it's not my burden to find cases that exempt foster  
8 care. It's the plaintiff's burden to prove that foster care  
9 falls under the statute.

10 Your Honor, I haven't seen anything in the  
11 complaint that challenges the bidding procedure itself.  
12 There are -- there's Florida Statute 287.057, certain  
13 contractual services are not subject to the competitive  
14 solicitation requirements. That's another whole argument  
15 that I haven't seen them raise, a problem with a competitive  
16 bidding in this lawsuit.

17 So we've got the issue of standing and scope. I  
18 think everything else falls in line, Your Honor. I think  
19 irreparable harm -- I can't imagine there's any irreparable  
20 harm to the C.P.A. They seem to mix their arguments between  
21 supposed harm that's occurring to these children, which the  
22 affidavits really just say that it's difficult for them to  
23 change -- only some of them to be changing providers. We  
24 have contrary affidavits that seem that they've had -- that  
25 say that Devereux has had meet and greets, that they've had

1 one-on-one consults, and there's a clash in the affidavits on  
2 that issue, but, really, that's not even harm to the  
3 plaintiffs. No one here is representing the children as  
4 plaintiffs as in the -- in that Indiana case that they cited,  
5 they had actual Medicaid recipients as plaintiffs.

6 Then they filed a petition, which I filed yesterday  
7 a request for judicial notice, but Florida Mentor has filed a  
8 petition against D.C.F. for an administrative hearing on some  
9 of these same issues through another law firm from Tampa, and  
10 in paragraph 21 of that, of that petition, it seems to say  
11 that foster children in Florida remain the state's  
12 responsibility and that community-based agencies, like my  
13 client, simply carry out the state's responsibility of  
14 providing child welfare services.

15 So I think it's kind of hard to say that my  
16 client's done anything wrong when they're also at the same  
17 time seeking an administrative hearing against the D.C.F.

18 The Court's already noted that the plaintiffs did  
19 not sue for breach of contract. The lease for office space  
20 issue is not irreparable harm. That's just the fact they're  
21 saying that they had to lease for some space and the lease is  
22 three years. I don't know if it was advance paid or whatever  
23 or even if it's been re-let, but that's not irreparable harm.  
24 There's no -- I can't find any evidence of irreparable harm  
25 in the affidavits.

1           Then I touched on this a bit, but the threatened  
2   injury, they would have to prove that the threatened injury  
3   to the plaintiffs outweighs potential risks and damage that  
4   the injunction may cause. It doesn't really make sense to  
5   ask a court to enjoin us from prohibiting them to -- from  
6   continuing to operate its homes. I mean, the whole thing  
7   sounds flawed. We're not -- we just had a new contract that  
8   came up, and an injunction here would disturb the status quo.  
9   And, Your Honor, the public interest -- in my opinion, the  
10   public interest is to support the welfare of the children,  
11   and the children are now with -- getting acclimated to a  
12   brand new service, and I think an injunction would be adverse  
13   to the public interest.

14           Your Honor, we would seek our legal fees just  
15   because I don't think there's any case where a C.P.A. has  
16   ever been able to sue someone after losing a bid to try to  
17   enjoin us from going with someone else. Unless there's some  
18   kind of a basis in the law for that, we'd appreciate getting  
19   our legal fees paid, because this has been extremely  
20   expensive and we can't find a case like it.

21           THE COURT: All right. Thank you.

22           I permitted an amicus participation here. Does  
23   counsel want to say anything? Do you want to file a brief?  
24   How do you want to express your views?

25           MR. SHEERAN: Your Honor, we would like to file a

1 brief in this matter; but, with your permission, I would like  
2 to address the Court for purposes of this preliminary  
3 injunction hearing, just because I think that we can provide  
4 some insight to these issues that haven't been presented yet.

5 THE COURT: All right. Well, come on up to the  
6 podium, then.

7 MR. SHEERAN: Sure.

8 THE COURT: You're Mr. Sheeran?

9 MR. SHEERAN: Andrew Sheeran, yes. I represent the  
10 Agency for Healthcare Administration.

11 As the amicus party here, Your Honor, the Agency  
12 for Healthcare Administration, or AHCA, is impartial as to  
13 these parties. My understanding is that AHCA has the same  
14 relationship with both the plaintiff and the defendant, and  
15 that is that I believe both are enrolled Medicaid providers.

16 The agency doesn't favor one party or the other  
17 providing services to Medicaid-eligible recipients, to the  
18 extent that both parties are in fact eligible to do so and  
19 meet all of the requirements for Medicaid providers.

20 AHCA's interest in this matter is that the  
21 plaintiff is attempting to enforce against the defendant a  
22 provision that AHCA believes is only applicable and  
23 enforceable against AHCA.

24 I think the confusion here -- and I do think that  
25 this is --

1 THE COURT: So you want them to sue you instead?

2 MR. SHEERAN: I think they could sue us and lose,  
3 and I guess we could get attorney's fees for it, but I'm not  
4 asking them to sue us.

5 I think the confusion here is that we have the  
6 convergence of two state programs, one of which AHCA has  
7 nothing to do with and it's the Florida foster care program,  
8 and the other is the Florida Medicaid program.

9 I said AHCA has nothing to do with the foster care  
10 program, but they do in fact overlap and that's -- they  
11 overlap in the fact that foster children or children in the  
12 foster care system in Florida are automatically eligible to  
13 receive services under the Florida Medicaid program, which  
14 is -- covers medical services for many categories of needy  
15 persons, including foster children.

16 So to talk briefly about what Medicaid is, Medicaid  
17 was created by Congress in Title 19 of the Social Security  
18 Act in 1965, and under Title 19, Congress permits states to  
19 create plans for medical assistance that -- to provide  
20 medical assistance and medical services to certain categories  
21 of needy persons. The plan has to comply with the basic  
22 requirements of the federal Medicaid Act, which is Title 19;  
23 and once the federal government, the department of Health and  
24 Human Services, approves the plan, then the federal  
25 government pays a share of the cost for the services under



1 that plan. In Florida, I think it's about 55 percent is paid  
2 for by federal money.

3 The requirements for state plans that apply to all  
4 states -- and every state has a Medicaid program -- are found  
5 in Section 1902(a) of the Social Security Act, and that is in  
6 U.S. Code, Title 42, Section 1396a(a).

7 Now, one of the provisions from this section is the  
8 freedom of choice requirement which forms the basis for the  
9 pending motion.

10 If you don't mind, Your Honor, I need to grab the  
11 paper that I left at my desk here.

12 THE COURT: Sure.

13 THE JUROR: On the provision in 1396a(a) is number  
14 five, which requires that states provide for the  
15 establishment or designation of a single state agency to  
16 administer or supervise the administration of the Medicaid  
17 program in that state.

18 In Florida, that single state agency is the Agency  
19 for Healthcare Administration. The Florida legislation  
20 designated AHCA as the single state agency for Medicaid in  
21 Section 409.902 of the Florida statutes.

22 Our position is that AHCA is responsible for  
23 ensuring that Medicaid in Florida complies with the federal  
24 Medicaid act and that any deficiencies in that regard are  
25 enforceable against AHCA and no one else. I think that's

1 clear if you go through the requirements set forth in  
2 1396a(a) .

3 A number of them, they just -- when you read them,  
4 they obviously could only be insured by and enforceable  
5 against the state agency administering the program. One of  
6 them is sub three, which requires that state plans provide  
7 for granting an opportunity for a fair hearing before the  
8 state agency to any individual whose claim for medical  
9 assistance under the plan is denied or not acted upon.

10 So a Medicaid provider who denies a claim, they  
11 don't have an obligation under the federal law to provide a  
12 hearing for that, but the state agency, AHCA, does.

13 Another example would be sub 27 under 1396a(a) , and  
14 what that says is that the plan must provide for agreements  
15 with every person or institution providing services under the  
16 state plan in which those persons or institutions agree to  
17 certain things, but the point is that that could only be  
18 enforced against the entity providing for such agreements, in  
19 this case, AHCA.

20 So AHCA has a deep concern that a provision which  
21 applies to AHCA could be interpreted by a court in any way in  
22 a matter in which AHCA is not involved. So that's why we  
23 moved to participate as amicus here.

24 THE COURT: What is your agency's relationship with  
25 the defendant? Do you have a contractual relationship?

1 MR. SHEERAN: Only to the extent that if they are a  
2 Medicaid provider, which means they're enrolled as a provider  
3 of services. They can get paid by Medicaid, which I think  
4 that they are, but I think it's the same relationship that  
5 they have with the plaintiff. And that actually goes to, I  
6 think, the confusion with the other state program, which is  
7 the foster care program, which I will talk about a little  
8 bit, even though that's not my area.

9 With regard to the enforceability of the federal  
10 Medicaid act against AHCA, I think it's very telling that all  
11 of the cases cited in the plaintiffs' motion for enforcing  
12 the "freedom of choice" provision, every single one of them  
13 was enforced against the state agency responsible for  
14 administering the Medicaid program in that state except for  
15 one in which it was the state agency's delegate, which is not  
16 the relationship that AHCA has to either party here.

17 Now, even if the Court were to find that the  
18 provisions of 1396a(a) could be enforced against another  
19 entity, there's a question of fact as to whether those  
20 provisions have been applied at all to this program, and  
21 that's where we get into the question of Medicaid or the  
22 issue of Medicaid waivers, and that's under another provision  
23 of the Social Security Act, section 1915, which is in the  
24 U.S. Code, Title 42, Section 1396(n).

25 There's a number of -- the first under 1396(n) is

1 sub (a) and it says, "A state shall not be deemed to be out  
2 of compliance with the requirements of paragraph one, ten or  
3 twenty-three of Section 1396a(a) of this title solely by  
4 reason of the fact that the state," and then it describes a  
5 waiver program, essentially.

6 B, which describes another kind of program, refers  
7 to the authority of the secretary of the federal department  
8 of health and human services to, quote, "waive such  
9 requirements of Section 1396(a) of this title," and then in  
10 parentheses it lists some provisions which are not included,  
11 not waiveable, of which sub 23 is not listed. So it's not  
12 one of the exceptions, okay?

13 "Insofar as it requires provision of the care and  
14 services described" -- sorry -- "as may be necessary for a  
15 state to," and then it describes another kind of waiver  
16 program. So there's a question of fact as to whether there's  
17 a waiver program here.

18 Now, my understanding of the role of an amicus is  
19 not that such entity would present evidence to the Court, but  
20 I think that the role -- that it is important that the Court  
21 be alerted to an issue of fact that has to be resolved in  
22 order for the Court to make this determination.

23 So I have an approved 1915(b) Medicaid waiver  
24 application, effective date July 1, 2011. It includes a  
25 number of programs which fall under this waiver, one of which

1 is a prepaid mental health plan program, and that refers to a  
2 requirement in Florida to enroll all Medicaid-eligible  
3 children to receive their behavioral health care services  
4 through a specialty prepaid plan operated by community-based  
5 lead agencies.

6 There is a section in here which describes  
7 statutory authority, the authority to waive provisions of the  
8 Medicaid act, and then a section identifying which provisions  
9 have been waived.

10 I don't know if it would be helpful to put this  
11 under the screen or just to -- since I'm not presenting  
12 evidence, just to alert the Court that section sub 23 is  
13 identified here.

14 So there's a question of fact as to whether -- I'm  
15 sorry. It also says that this is the child welfare prepaid  
16 medical health plan in which Section 23 is waived.

17 So there's an important question of fact here,  
18 which neither party has presented evidence sufficient for the  
19 Court to resolve, as to whether this provision has in fact  
20 been waived by the federal government and doesn't even apply  
21 here.

22 And my last point is I talked about this being the  
23 convergence of two separate programs, Medicaid and the foster  
24 program. The foster care program is not what AHCA  
25 administers. It's administered by the Department of Children

1 and Families; but there's a question of fact, I think, for  
2 the Court to resolve as to the relationship between the  
3 Department of Children and Families and foster children and  
4 how -- what role the defendant plays in that relationship,  
5 whether D.C.F. has custody of these children and is therefore  
6 the parent and whether the parent or the parent's delegate  
7 could be in violation of a Medicaid provision requiring  
8 freedom of choice by choosing for their own children, for the  
9 children in their custody, what providers they're going to  
10 send them to.

11 So there's a question as to whether a parent has to  
12 give their children freedom of choice under the Medicaid act.  
13 That's a question of child custody law, I guess, that D.C.F.  
14 administers. I'm not familiar with any such requirement.

15 So that's all that I have for you. I'm also, I  
16 guess, available to answer any questions you might have. And  
17 I hope that I've at least alerted the Court to the issues  
18 that haven't really been discussed by the parties.

19 THE COURT: All right. Do you want to file a brief  
20 of some sort?

21 MR. SHEERAN: If the Court would find it helpful,  
22 then we're happy to file a brief. If I've given the Court  
23 everything that you want or that you would need to address  
24 these issues, then it's really at your discretion.

25 THE COURT: Okay. Well, I'll let you know.

1 MR. SHEERAN: Okay.

2 THE COURT: All right. Anything further from the  
3 plaintiff?

4 MR. MacLENNAN: No, Your Honor.

5 THE COURT: Well, we have some housekeeping  
6 matters. You filed an amended complaint. So your original  
7 motion to dismiss is moot, I guess. You're going to have to  
8 file another one.

9 MR. HATHAWAY: Yes, Your Honor, and we can have  
10 that filed probably by the end of the day. I think it's  
11 going to be very similar to the first one. I'll just have to  
12 make sure it matches up properly with the new pleading.

13 THE COURT: All right. Well, you don't have to do  
14 it today, but go ahead and get that done when you can.

15 MR. HATHAWAY: Okay.

16 THE COURT: Then you'll file a response to that?

17 MR. MacLENNAN: Yes, Your Honor.

18 THE COURT: It's my believe, at least at this  
19 point, that I'm going to resolve all of these issues in one  
20 order, because, obviously, the arguments in the motion to  
21 dismiss dovetail with the arguments in regard to the motion  
22 for preliminary injunction as well. So that would be my  
23 present intention.

24 Do y'all want to order a transcript of this so I  
25 can have something to refer to? Y'all would have to pay for

1 it. I can't pay for it.

2 MR. MacLENNAN: We'd be happy to do that, Your  
3 Honor.

4 THE COURT: Do you want to split the cost?

5 MR. HATHAWAY: That would be fine.

6 THE COURT: Okay. All right. We'll go ahead and  
7 get a transcript of this. Get your motion to dismiss filed,  
8 and you can respond in due course, and then I'll try to get  
9 this resolved, okay?

10 MR. HATHAWAY: Thank you, Your Honor.

11 THE COURT: All right. Thank you.

12 (Proceedings terminated at 10:21 a.m.)

13 - - - - -

14 Reporter's Certification

15 I certify that the foregoing is a correct transcript from the  
16 record of proceedings in the above-entitled matter.

17 s/Diane Peede, RMR, CRR  
18 Official Court Reporter  
United States District Court  
19 Date: July 21, 2011 Middle District of Florida  
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